Supreme Court, U. S.
FILED
NOV 1 1978
MICHAEL RODAK, JR., CLERK

No. 78-159

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANDREW B. CARSELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his conviction for filing false income tax returns, claiming that the trial court erred in refusing to suppress evidence he contends was seized illegally by local police officers.

Following a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of filing false income tax returns for 1971-1973, in violation of 26 U.S.C. 7206(1) (Pet. App. 1-2). The district court sentenced petitioner to concurrent prison terms of 18 months (Pet. App. 2). The court of appeals affirmed (Pet. App. 1-11).

The pertinent facts are as follows: While executing a search warrant for gambling records and paraphernalia at petitioner's residence, Chicago police officers seized a set of records that appeared to reflect usurious transactions (Pet. App. 2-3). Subsequently, state charges of criminal usury

were brought against petitioner, but they were later dismissed following the suppression of the usury records by a state court on the ground that they were outside the scope of the warrant (Pet. App. 3). Prior to the suppression order by the state court, the Internal Revenue Service had examined the records and begun an investigation to determine whether petitioner had failed to report interest income on his federal income tax returns. The court of appeals described the Service's investigation as follows (Pet. App. 3-4) (footnote omitted):

> Carsello's returns were obtained internally by IRS agents, who then interviewed about six to eight persons whose names they had gleaned from the seized records. One of the persons interviewed was Joe Francone, an employee of Grand Sanitation and Supply, who had asked for but been denied a loan by Carsello. Francone, however, did provide the interviewing agent with the names of 35 Grand Sanitation customers. One of those customers was the Brighton Construction Company, which was at the time itself the subject of a separate IRS investigation. The investigating agent then reviewed Brighton's cancelled checks, which were already in the possession of the IRS, and learned that Carsello had cashed checks from Brighton at two Chicago currency exchanges. The agent then visited the exchanges and obtained additional names of Grand Sanitation customers by reviewing checks cashed by Carsello at one of the exchanges. Now having a list of about 70 Grand Sanitation customers, the agent obtained all cancelled checks and invoices relating to their transactions, with Grand Sanitation. These cancelled checks and invoices, obtained from Grand Sanitation customers were instrumental in proving the defendant's failure to report gross business receipts * * *.

The district court suppressed the usury records on the ground that they were outside the scope of the warrant.[1] As a result, the government limited its proof to petitioner's failure to report gross income received by his Grand Sanitation and Supply Company, a business unconnected with petitioner's money-lending activities (Pet. App. 1-2).

The court of appeals upheld the district court's admission of the evidence relating to the activities of Grand Sanitation and Supply. In its view, "the causal link between [petitioner's] usury records and the evidence admitted at trial was tenuous at best and sufficiently attenuated by intervening circumstances, including the voluntary cooperation of Francone, the currency exchange operator and Grand Sanitation customers themselves, as to permit the use of the cancelled checks and invoices at trial" (Pet. App. 10).

The decision below correctly held that the cancelled checks and invoices obtained from customers of Grand Sanitation and Supply were properly admitted into evidence. As the court of appeals recognized, the question is not whether the evidence would not have come to light in the absence of the illegal search but " 'whether, granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963)' " (Pet. App. 6).

Here, applying the *Wong Sun* test, the evidence of Grand Sanitation and Supply's activities was sufficiently distinguishable from the illegal seizure of petitioner's usury

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[1]The government did not challenge the court's suppression order and chose not to proceed on one of the tax counts and two of the obstruction of justice counts in the indictment. Petitioner was acquitted on the remaining obstruction of justice count (Pet. App. 2).

records to be purged of that primary taint. To be sure, the usury records were a source of leads for the tax investigation. But the usury records did not lead directly to any of the evidence actually used against petitioner at trial. Indeed, the only link between the evidence at trial and the usury records was a notation of "Joe F." together with an address and telephone number, both of which were out of date. However, the investigating agent discovered Joe Francone's current address from independent sources and interviewed him as a potential source of information with respect to petitioner's lending activities. While Francone was not able to describe petitioner's lending activities, he fortuitously revealed that he worked for petitioner at Grand Sanitation and Supply and provided the agent with the names of 35 of its customers (Pet. App. 7-8).

The court of appeals described the subsequent chain of events as follows: "By chance, one of those customers happened to be the Brighton Construction Company, which was itself the subject of an unrelated IRS investigation at that time. From Brighton's cancelled checks, which were then in the hands of the IRS, the agent learned that [petitioner] had cashed checks made out to Grand Sanitation at two Chicago currency exchanges. With the cooperation of one of the currency exchange operators, the agent was able to obtain a list of about 35 more Grand Sanitation customers. Armed with the customer list, the agent then obtained the cancelled checks and invoices admitted against [petitioner] at trial from the customers themselves" (Pet. App. 8).

On these facts, the court of appeals correctly held that the causal link between the illegal seizure of the usury records and the discovery of the cancelled checks and invoices was so indirect as to purge them of any taint from the seizure. As the court observed (Pet. App. 8-9), "[t]here is simply no way that the Chicago police officers who

seized [petitioner's] usury records or the federal agents who photocopied them could have foreseen that they would prove useful in the course of a tax fraud investigation begun six months later into [petitioner's] legitimate business enterprise * * *."

In this respect, the court below correctly recognized that its decision was in accord with *United States* v. *Ceccolini*, 435 U.S. 268 (1978). There, the Court held that the deterrence rationale of the exclusionary rule did not apply to the voluntary cooperation and testimony of a witness that occurred when a substantial period elapsed between an illegal search and the initial police contact with the witness. Like the testimony of the witness in *Ceccolini*, the voluntary cooperation of the Grand Sanitation and Supply Company customers could not have been anticipated at the time of the illegal seizure of petitioner's usury records. Since "the physical evidence [petitioner] seeks to suppress was discovered as a result of information *voluntarily* supplied by a *third-party* to the investigation whose cooperation was not extracted by any police misconduct" (Pet. App. 9 n.3) (emphasis in original), the facts of this case are analogous to *Ceccolini*.[2] Accord: *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975).

At all event, this case simply involves the application of settled legal principles to particular facts and is accordingly not suitable for review by this Court.

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[2] *United States* v. *Scios*, No. 75-1679 (D.C. Cir. July 21, 1978) (en banc), upon which petitioner relies (Pet. 17-21), is not to the contrary. Like the court below, the court in *Scios* applied the *Wong Sun* standard but found on the particular facts presented there that the discovery of the witness was the direct result of the illegal search and that the testimony of that witness was a product of coercion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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DOJ-1978-10